No. 13,020

IN THE

United States Court of Appeals

For the Ninth Circuit

LEONA SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

This is an appeal from a judgment of the District Court for the District of Alaska, Fourth Judicial Division, sentencing the defendant to be confined in the Federal Reformatory for Women at Alderson, West Virginia, for a period of two (2) years. Said judgment was entered on the 11th day of June, 1951 (T.R. 11-12) pursuant to a jury trial and a verdict of "not guilty of the crime charged in the information in this case * * * guilty of the crime of attempting to commit the crime set forth in the information filed in this cause, to-wit: the crime of feloniously having possession and control of heroin, a narcotic drug" (T. R. 5), based on Sections 40-3-2 and 40-3-20 and 65-2-5 of the Alaska Compiled Laws Annotated, 1949. Notice of

appeal was filed on the 11th day of June, 1951 (T.R. 12-13). The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chapter 786, 31 Stat. 322, as amended (48 U.S.C. Sec. 101). The jurisdiction of this Court is invoked under Sec. 128 of the Judicial Code as amended (28 U.S.C. Sec. 255 (a), now 28 U.S.C. New, Sections 1291, 1294).

STATEMENT OF THE CASE.

Mr. Power G. Greer, U. S. Treasury Department Agent, as a result of a telephone conversation with an anonymous informer, went to the Pan American World Airways office in Fairbanks, Alaska, on February 9, 1951 to inspect the contents of a package at said office, consigned to Juanita Pearson (T.R. 18, 19, 20, 40). Mr. Greer obtained the package addressed to Juanita Pearson from a Mr. Harris at the Pan American office, opened it, and found that it contained a white substance which he believed to be a narcotic drug (T.R. 19, 20, 21, 22, 23, 40, 41). Mr. Greer then, on February 9, 1951 took the white substance to the chemical laboratory, Ladd Air Force Base (Alaska), and there had Dr. Bouden make an analysis of a small portion of it (T.R. 23, 42). The remainder of the white substance was then sent a day or so later by Mr. Greer, to the Alcohol Tax Unit, U. S. Treasury Department, Seattle, Washington, where it was received and chemically analyzed by Mr. Hugo Ringstrom, a chemist in said Alcohol Tax Unit (T.R. 24, 85, 86). Mr. Ringstrom found from his analysis,

that the substance consisted of 358 grains of heroin, a narcotic (T.R. 86, 87).

James R. Brazell, a cab driver for Checker Cab, received a call on February 10, 1951 to proceed to 642 4th Street in Fairbanks, Alaska. When he reported to 642 4th Street, Leona Simpson handed him a note, told him to take it to Pan American cargo office and get a package for her there (T.R. 70, 71). Mr. Brazell took the note to the Pan American Cargo office, gave it to an employee, and Mr. Greer and U. S. Marshal Theodore R. McRoberts came up to Brazell from a back room. Greer and McRoberts asked Brazell where he got the note and if the address was the same as the one of the package which they held in their hands. Brazell told them the address on the note and package were different from the one where he got the note; that he got the note at 642 4th and was to take the package to 642 4th (T.R. 25, 28, 70, 71, 75).

Greer and McRoberts instructed Brazell to take them where he had got the note and he took them to 642 4th Street (T.R. 28, 59, 60, 66, 71).

When they arrived at 642 4th the door was open and Leona Simpson and Betty Austin were standing inside the room (T.R. 29, 33, 60, 71).

Mr. Greer asked Brazell which woman had given him the note and Brazell pointed out Leona Simpson (T.R. 29, 61).

Mr. Greer held the note in his hand and asked Leona Simpson if she had written it, to which she replied "Yes" (T.R. 33, 61).

Mr. Power Greer then asked Leona Simpson if she had given the note to the cab driver and she said "Yes" (T.R. 34).

Greer then said, "Well, here's your package", to which Leona Simpson replied, after some hesitation, "It isn't my package. I was going to get it and keep it for someone" (T.R. 34, 61).

Greer next asked Leona Simpson if she would tell him who the person was that she was to keep it for, but she never replied although he then informed her that the package had contained narcotics (T.R. 34, 35, 61).

Leona Simpson was then placed under arrest by Power Greer and, after about thirty minutes, she, Greer and McRoberts started to leave the house. Prior to leaving the house, Greer discovered that the note, which he had shown to Leona Simpson, was missing (T.R. 37, 38, 39, 62).

It was quite obvious at the conclusion of the government's case that neither the defendant nor her agent, the cab driver, had actual possession and control of the narcotic. It was equally obvious that an attempt had been made by the defendant through her unwitting agent to possess and control a narcotic drug, to-wit, heroin. This attempt was thwarted when the Treasury Agent intercepted the package containing the narcotic. The government argued that the lesser offense of attempt had been committed and that the case should go to the jury. The defendant introduced no evidence in her behalf. The Court instructed

the jury that it could find the defendant guilty of a lesser included offense of attempt under the general attempts statute of the Territory of Alaska.

QUESTIONS PRESENTED.

1. Whether the trial Court erred in denying appellant's motion for a directed verdict of acquittal at the close of the evidence (T.R. 93, 94); in overruling appellant's exception to the trial Court's instruction on the law of attempt; in denying appellant's motion for a judgment of acquittal (T.R. 6, 7) after verdict; and denying appellant's alternative motion for a new trial (T.R. 6, 7) insofar as said alternative motion was based on the trial Court's refusal to direct a verdict and sustain appellant's exception.

The instruction complained of reads in full as follows:

> "The Law of Alaska provides that if any person attempts to commit a crime and in such attempt does an act toward the commission of such crime but fails or is prevented or intercepted in the perpetration thereof, such person, if proven guilty of such attempt beyond a reasonable doubt, shall be punished as provided by law." (Instruction 3(a); T.R. 96.)

In excepting to this instruction, the ground stated by appellant was:

> "* * * upon the ground as to an attempt to commit the crime charged in the information upon the ground there was no attempt alleged in the

information whereas the law relating to the unlawful use and possession of narcotics contains a clause defining attempts to violate the narcotic law and then, also, Your Honor, I am going to except to * * *''

The trial Court's denial of this exception and its other adverse rulings as previously set out in this specification bring before this Court for appellate review the question of whether or not an information charging felonious possession and control of a narcotic drug state a crime for the attempted commission of which appellant can be tried and convicted under Territorial Law.

2. Whether the Court erred in overruling appellant's objections to the admission of testimony on appellee's direct examination of the witness, Power G. Greer, regarding a note, without the note having first been introduced in evidence.

ARGUMENT OF THE CASE.

Specification No. 1.

Appellant could have been, and was found guilty of an attempt to possess and control a narcotic drug which is a criminal offense against the Laws of Alaska.

Section 40-3-2 Alaska Compiled Laws Annotated 1949 reads as follows:

> ''It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this Act.''

It is quite obvious that the foregoing denounces certain acts as crimes.

Section 65-2-5, ACLA 1949, which was originally enacted by Congress on March 3, 1899 in 30 Stat. 1253 reads as follows:

> "That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished as follows: * * *"

The appellant denies that 65-2-5 applies insofar as Section 40-3-2 is concerned because she says that Congress did not intend for it to apply.

However, Congress stated in the original act which has now been incorporated in the ACLA 1949 as Section 65-1-3 that:

> "Effectiveness of common law: That the Common Law of England as adopted and understood in the United States in regard to criminal matters shall be in force in Alaska except as modified by statutory law of the Territory."

The general common law concept of attempt is that an attempt to commit *any crime* is an offense whether the offense attempted be a felony or merely a misdemeanor. This concept is set forth in a case quoted by appellant, *State v. Broadnax,* on page 610 of 45 Southern Reporter, 2d series in the opinion.

The general attempts section would not be rendered inapplicable because of the Sec. 40-3-17 ACLA 1949 which deals with certain types of attempts. Section 40-3-17 reads as follows:

"Fraud or Deceit. (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

"(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

"(3) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this Act.

"(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

"(5) No person shall make or utter any false or forged prescription or false or forged written order.

"(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

"(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this Act, in the same way as they apply to transactions under all other sections. (L. 1943, ch. 6, pp. 17, p. 60)."

The foregoing applies when a person obtains or attempts to obtain a narcotic drug under color of authority or by fraud or deceit, all from a lawful source. This case at bar dealt with an attempt to possess narcotics from what was not a legal source, such as a medical doctor or licensed pharmacy. The point is aptly stated in *State v. Broadnax,* in the syllabus at 45 So. (2d) 605 which reads as follows:

"13. Poisons.

"Provision of the uniform narcotic drug act making it an offense to obtain or to attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge describes a crime distinct from offense denounced by provision of the act dealing with unlawful possession of narcotic drugs, and does not preclude application of provision of the criminal code making it a crime to attempt to commit an offense, where only unlawful possession is involved."

Counsel for appellant stated on page 18 of his brief:

"When confronted with the argument that the specific attempts enumerated in Section 17 of the Narcotics Act indicated legislative intent not to make the 'attempts' article applicable, the court could only state, at page 410 of the opinion as printed in the Southern Reporter:

'We do not agree that Section 17 shows any intention of the redactors of the Code to exclude Section 2 of the Uniform Narcotic Drugs Act from the application of Article 27.' "

However, the Court stated much more than that portion quoted by counsel for appellant and that portion of the opinion set forth on page 610 of 45 So. (2d) is quoted herewith in its entirety:

"(13) Counsel for defendant argue and contend that Article 27 is not applicable in the instant case, for the reason that Section 17 of the Uniform Narcotic Drug Act, the Act under which defendant was prosecuted, makes it an offense to obtain or attempt to obtain a narcotic drug under certain circumstances, and that for this reason it was not the intention of the authors of the Criminal Code that the attempt article of that Code should be applicable to the offense here charged. Section 17 does make it an offense to obtain or attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge or by forgery, alteration of prescription or any written order, or by the concealing of any material fact, or by the use of a false name or the giving of a false address, etc. It was clearly the intention of the Legislature to denounce the acts set forth in Section 17 as crimes separate and distinct from, and not connected with, the offense denounced in Section 2 of the Act dealing with unlawful possession of such drugs. What Section 17 denounces is the obtaining or attempting to obtain a narcotic drug under color of authority or by fraud or deceit. We

> do not agree that Section 17 shows any intention of the redactors of the Code to exclude Section 2 of the Uniform Narcotic Drug Act from the application of Article 27."

Minter v. State (1942), 75 Okl. Cr. 133, 129 P. (2d) 210, cited by appellant, is not applicable in the case at bar because this offense could not have been charged under Section 17 of the Uniform Narcotic Drug Act, which section, as previously stated, is a limited "attempts" section.

People v. Marks (1914), 24 Cal. App. 610, 142 P. 98, also cited by appellant is inapplicable to the present case for the reasons set forth under *Minter v. State,* supra.

In no instance is *Rich v. State* (1937), 61 Okla. Crim. Rep. 148, 66 P. (2d) 950, cited by appellant in point. The question presented in the "Rich" case was whether or not a former narcotic act was repealed by enactment of the Uniform Narcotic Drug Act. The determination of such a question has no bearing in this present case wherein we are to determine the effect of a "general attempts" statute on the Uniform Narcotic Drug Act.

In conclusion, regarding Specification No. 1, it is quite evident that the Louisiana case, *State v. Broadnax,* 45 So. (2d) 604 is "on all fours" with the present case and shows that a "general attempts" statute applies to violations of the Uniform Narcotic Drug Act.

It is submitted on the basis of the foregoing authorities and argument, that the action of the trial Court in this cause, should be affirmed.

ARGUMENT ON SPECIFICATION NO. 2.

Appellant cites as error the refusal of the trial Court to sustain the defendant's objection to testimony concerning a note without the note being first introduced in evidence.

Appellee respectfully submits that the note itself became immaterial upon the introduction into evidence of the admissions of defendant regarding the contents of the note. The best evidence rule does not apply when parol admissions against interest are introduced and such admissions are competent as primary evidence against the party making them although they involve what must necessarily be contained in a written instrument. This concept of law is well stated by the Court on page 310 of the opinion in *Gardner v. City of Columbia Police Dept., et al.,* 57 S.E. (2d) wherein the Court said:

> "(10) 'The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record.' Jones on Evidence, Sec. 208, Page 256. And it is

> generally held that the best evidence rule does not apply to parol admissions in pais and against interest, or acts equivalent thereto, and that such admissions are competent as primary evidence against the party making them, although they involve what must necessarily be contained in a written instrument. I Greenleaf on Evidence, Secs. 96, 97; 32 CJS Evidence SS. 788, page 714; 20 Am. Jur., Sec. 425, Page 379; Llewellyn v. Atlantic Greyhound Corp., 204 S.C. 156, 28 SE (2d) 673."

Mr. Power G. Greer testified that he showed the note to defendant, Leona Simpson, and asked her if she had written it and she stated that she had written it. Mr. Greer asked again if she gave the note to the cab driver and if this was the package she had sent him to pick up. She replied affirmatively but stated that she was just going to keep the package for someone. She refused to tell for whom she intended to keep the package (T.R. 33, 34, 35, 61, 71, 72). Thus it may be seen that the defendant did make certain admissions against interest that could stand as primary evidence and render unnecessary the introduction of the note in evidence.

Appellee further contends that a sufficient showing was made that the note had been lost on appellant's premises to permit the introduction of secondary evidence if we disregard entirely the admissions against interest discussed in the preceding paragraph.

After Mr. Greer testified that he had shown the note to Leona Simpson and she acknowledged writing it, giving it to the cab driver and sending him for the package, Greer further stated that he lost the note while at Leona Simpson's house. The fact that the note was lost, on defendant's premises, was also testified to by U. S. Marshal T. R. McRoberts (T.R. 37, 38, 39, 49, 62, 66). No evidence was introduced by defendant. It was, therefore, shown that the document was lost to the government and is presumably in the possession and custody of defendant since it was lost in her home. The following is quoted from 67 A.L.R. 79:

> "The rule was well stated in McKnight v. United States (1902), 54 C.C.A. 358, 115 Fed. 972, where the court said: 'The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so."

It is submitted on the basis of the foregoing authorities and argument, that the action of the trial Court in this cause, should be affirmed.

Dated, January 4, 1952.

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Service by receipt of copy of the foregoing brief of appellee is hereby acknowledged, this 4th day of January, 1952.

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